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APPENDIX A

JUDGMENTS AND DECISIONS

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 28926

TEAMSTERS LOCAL UNIONS 745, 47, 886, 523, 270, 5, 568, 667, and 891, *Plaintiffs-Appellees*,

v.

BRASWELL MOTOR FREIGHT LINES, INC., *Defendant-Appellant*.

(Filed June 30, 1970)

Before PHILLIPS,* BELL, and SIMPSON, Circuit Judges.

BELL, Circuit Judge:

The suit which underlies this appeal was brought by nine Teamsters local unions under § 301 of the Labor Management Relations Act, 29 U.S.C.A. § 185, seeking enforcement of an arbitration award, injunctive relief and damages. The facts concerning the agreements and circumstances leading to the suit are fully discussed in the opinion of this court in an earlier appeal of the case. Teamsters Local Unions v. Braswell Motor Freight Lines, 5 Cir., 1968, 392 F.2d 1, modified on petition for rehearing, 395 F.2d 655. See also, Local Freight Drivers, Local No. 208; Line Drivers, Local No. 224, etc. v. Braswell Motor Freight Lines, Inc., 9 Cir., 1970, 422 F.2d 109. Braswell acquired another freight line by merger and the question presented to the arbitrators was whether the National Master Freight Agreement in force between Braswell and teamsters locals in another territory of Braswell was to be applied to include the locals representing employees in the territory of

* Of the Tenth Circuit, sitting by designation.

the merged freight line. The arbitral body answered in the affirmative.

On the previous appeal, we reversed the summary judgment entered in the district court for Braswell, and also concluded that the plaintiff unions were entitled to the arbitral award that they were parties to the National Agreement. We then remanded to the district court for "further proceedings as to the scope and quantum of relief to which the unions may be entitled, and defenses, if any, that Braswell may have." 395 F.2d at 636.

On remand, further evidence was presented and the district court entered an order striking Braswell's defenses and granted summary judgment as to liability in favor of the union. The arbitration award[1] was enforced, and since the agreement was found to be still in effect, a permanent injunction was issued requiring compliance with the agreement until its expiration date—March 31, 1970.[2] The issues of damages were submitted to a master under Rule 53, F.R.Civ.P. and are as yet undetermined.

[1] Braswell appeals from the district court's decision, contending that the district court erred in striking its defenses and in granting summary judgment as to liability; by extending the agreement until March 31, 1970; and finally

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[1] "Articles I, II and III of the National Master Freight Agreement as applied in this case require that Braswell Motor Freight Lines apply the National Master Freight, Road, and Local Cartage Agreements and supplements thereto to the operation formerly known as Braswell Freight Lines Corporation and now merged into Braswell Motor Freight Lines Corporation."

[2] The permanent injunction was stayed in this court on the condition that if it be finally determined that the agreement was in full force and effect through March 31, 1970, Braswell would place the agreement in effect and specifically perform it for a period of 344 days (computed as the period from the district court's order, November 8, 1969, to the expiration date, March 31, 1970).

by referring the issue of damages to a master. For the reasons stated below, we affirm as to the striking of defenses and summary judgment on liability, and reverse as to the extension of the agreement until March 31, 1970. We do not reach the question involving the propriety of referring damages to a master because that portion of the district court's order is an interlocutory non-final order and is non-appealable under 28 U.S.C.A. § 1292.[1]

[2-4] As this court has said before, summary judgment is proper in a suit for enforcement of an arbitration award where no material issues of fact are presented. Fontainebleau Hotel Corp. v. Hotel Employees' Union, Local 255, 5 Cir., 1964, 328 F.2d 310, 311. Also, it is clear that a court may not weigh the merits of the questions which are before the arbitrator. Humphrey v. Moore, 1964, 375 U.S. 335, 84 S.Ct. 363, 11 L.Ed.2d 370; Oil, Chemical and Atomic Wkrs. Int. Un. v. Southern Union Gas Co., 5 Cir., 1967, 379 F.2d 774, 776; International Bro. of Pulp, Sulphite and Paper Mill Workers Local Union No. 674 v. St. Regis Paper Co., 5 Cir., 1966, 362 F.2d 711, 714; and Local U. No. 787, Inter. U. of E., R. and M. Wkrs. v. Collins Radio Co., 5 Cir., 1963, 317 F.2d 214. Thus the only fact issues which are relevant in determining the validity of this summary judgment are those involving the existence and terms of the contract providing for final and binding arbitration, whether the instant dispute falls under the arbitration clause of the contract, and the existence of an award resulting from arbitration. These issues were decided adversely to Braswell on the prior appeal of this case. It followed that summary judgment was proper, and it was in this posture that we remanded the case to the district court for a determination

---

[1] The summary judgment and extension of the agreement are appealable because these portions of the district court's order are inseparable from the granting of the permanent injunction which is clearly appealable under 28 U.S.C.A. § 1292(a)(1). It is not necessary that we reach the question of referral to a master in reviewing the issuance of this injunction.

as to whether there existed any defenses not already decided; and if not, then the scope and quantum of relief to be granted.

[5] The defenses raised by Braswell on remand were properly rejected. The only defense raised which was not previously decided by this court, was the question of waiver or estoppel. Braswell contends that by bargaining as to conditions of employment, the union waived its rights under the agreement or was estopped from asserting such rights. We agree with the district court's conclusion that as a matter of law there was no waiver or estoppel. Not only was such bargaining contemplated by the agreement, but it would denigrate the arbitration process to penalize the union because it tried to settle the dispute by bargaining while at the same time seeking to have the arbitration award enforced. This view is in accord with the national labor policy favoring arbitration as the means of final adjustment of labor disputes. See, for example, The Boys Markets, Inc. v. Retail Clerk's Union, Local 777, 398 U.S. 235, 90 S.Ct. 1583, 26 L.Ed.2d 199 (1970).

In sum, the district court did not err in striking the defenses asserted, and in granting summary judgment for the unions as to the liability of Braswell under the agreement and applicable supplements pursuant to the arbitration award. See Fn. 1, supra.

The only remaining question to be resolved involves the termination date of the agreement. The agreement, Article 37, § 1, provides that "This Agreement shall be in full force and effect from February 1, 1964 to and including March 31, 1967, and shall continue from year to year thereafter unless written notice of desire to cancel or terminate the agreement is served by either party upon the other at least sixty (60) days prior to date of expiration." The district court concluded that no such notice was given until April 23, 1969 and thus the agreement was found to be effective until March 31, 1970.

It is true that no prior notice was sent which recited the provisions of the agreement providing for termination. However, it is argued that the unions knew that Braswell did not desire to continue the agreement with these locals. It has been Braswell's contention from the beginning that no such agrement existed with the plaintiff locals. Braswell contends that its original answer and other written documents filed during the course of this litigation consistently showed that it "desired to cancel or terminate the agreement" and was sufficient notice for such purpose under Article 37, § 1 of the agreement.

[6] In our view it does not necessarily follow that a denial of the existence of the agreement is the same as cancelling an existing agreement. There was no cancellation until April 23, 1969 and then Braswell had no trouble in giving notice of cancellation while, at the same time, preserving its position that the agreement did not exist. If the agreement did not exist, then negotiations would ensue ab initio. It might be quite another matter to cancel an agreement with the result of leaving some employees under and others not under contractual terms of employment. The district court did not err in holding that there was no cancellation of the agreement prior to April 23, 1969.

The district court did err, however, in concluding that the cancellation of April 23, 1969 was not subject to the provision of the National Agreement having to do with the inadvertent failure to give notice of cancellation. In Article 37, § 4, it is provided:

> "In the event of an inadvertent failure by either party to give the notice set forth in Sections 1 and 2 of this Article, such party may give such notice at any time prior to the termination or automatic renewal date of this Agreement. If a notice is given in accordance with the provisions of this Section, the expiration date of this Agreement shall be the sixty-first (61st) day following such notice."

[7] In the event this provision of the agreement is applicable, the agreement would be terminated on the 61st day following April 23, 1969 rather than March 31, 1970 as was held by the district court. The court held as a matter of law that the "inadvertent failure" provision was not applicable. We do not agree. There is no definition of "inadvertent failure" in the agreement but the situation here was that the dispute between the parties began shortly after the merger in July 1964. The award of the arbitrators was entered on November 5, 1964. Braswell refused to abide the award of the arbitrators and the suit for enforcement followed. The district court then granted summary judgment for Braswell on July 7, 1966. We reversed in an opinion dated March 25, 1968, modified June 28, 1968. The matter was remanded to the district court for further proceedings. According to the brief filed on behalf of the unions, counsel for the union stated to counsel for Braswell on April 4, 1969 that the unions regarded the National Agreement and applicable supplements as having been automatically renewed pursuant to Article 37 because Braswell had not cancelled the agreements in the form required by Article 37. Braswell thereafter promptly cancelled the agreements. We hold that these facts, taken together, establish an "inadvertent failure" to give notice and that Braswell is entitled to the benefit of Article 37, § 4, supra.

This holding as to cancellation obviates the need to consider the further question regarding the propriety of injunctive relief since injunctive relief will not now be indicated. All other assignments of error on behalf of Braswell have been considered and are without merit.

Affirmed in part; reversed in part; remanded for further proceedings not inconsistent herewith.

Pre-Trial Order of the District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

No. 2692

TEAMSTERS LOCAL UNIONS, 745, 47, 886, 523, 270, 5, 568, 667 and 891, *Appellants*,

v.

BRASWELL MOTOR FREIGHT LINES, INC., *Appellee*.

(Filed: Nov. 8, 1969)

This 7th day of November, 1969, came on to be heard the above styled case for hearing pursuant to notice on all pending motions. At the conclusion of the hearing, the Court made findings of fact and conclusions of law filed herewith and made the following Order:

It is ORDERED, ADJUDGED AND DECREED as follows:

1. Jurisdiction of this Court is invoked by Plaintiffs' Original Complaint, filed November 5, 1964, as provided by Section 301(a) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C.A. Section 185(a). Defendant in its Second Amended Original Answer, Paragraph 1, admits that this Court has jurisdiction of the case pursuant to Section 301 as alleged. The Court therefore finds that it has jurisdiction to hear and determine the case on its merits.

The Defendant in its Second Amended Original Answer, Paragraph 1, denies that the Court has jurisdiction to issue the relief prayed in Plaintiffs' Original Complaint. The Court finds that Defendant's objections relates to the nature of appropriate relief and not to the jurisdiction of the Court. The Court finds that it has the authority to issue the relief prayed in Plaintiffs' Original Complaint, *Textile Workers Union of America* v. *Lincoln Mills of Alabama*,

353 U.S. 448, 1 L.Ed.2d 972 (1957), and accordingly overruled defendant's limited objection to the jurisdiction of this court.

2. The following questions are raised by pending motions:

(a) PLAINTIFFS' MOTION TO STRIKE CERTAIN DEFENSES:

In accordance with the court's order dated July 3, 1969, the plaintiffs filed on July 16, 1969 a motion to strike certain defenses raised by Defendant's Second Amended Original Answer, the filing of which the court authorized by its order dated July 3, 1969 subject to Plaintiffs' Motion to Strike. The said motion was set down for hearing on November 10, 1969 by the court's order of July 3, 1969.

The plaintiff has moved to strike all defenses which are stated in Defendant's Second Amended Original Answer as "first defense" through and including "tenth defense" and various other paragraphs which deny certain allegations made in Plaintiffs' Original Complaint. The plaintiffs' motions assert that each and every paragraph of the Answer to which its motion is directed concerns issues of law and fact which have been foreclosed by prior decisions of the Court of Appeals for the Fifth Circuit in this case and by this Court's order relating to interrogatories dated July 3, 1969 adversely to the defendant. The plaintiff asserts that each such paragraph and defense sought to be stricken concerns (1) whether the defendant is a party to the National Master Freight Agreement and applicable supplements, (2) whether the plaintiffs failed to perform a condition precedent to application of the National Master Freight Agreement and applicable supplements to the defendant, namely, the plaintiffs did not perform a card check to establish its majority representation and status as exclusive collective bargaining agent pursuant to Article 2, Section 3 of the National Master Freight Agreement and similar provisions contained in applicable supplements, and (3) whether procedures followed by the National Grievance Committee (whose arbitration award is now sought to

be enforced in this suit) were proper, including but not limited to the opportunity there presented to the defendant to raise certain defenses.

In connection with defendants' assertion that it is not a party to the various supplements made which are a part of the National Master Freight Agreement, this argument relates to the authorization given by the defendant to California Trucking Association and its designee Trucking Employers Inc. to bargain on its behalf. The defendant has contended that the authorization was limited to its "western division" and does not extend to the "supplemental agreements". This issue was considered by the Court of Appeals which held in its opinion dated March 25, 1968 at page 15:

> "While what we have said is dispositive of the case we point out that we do not agree with the District Court's conclusion that the Authorization itself forever limited Braswell's participation in the Agreement to its Western Division. We do not spell out the evidence in detail. But the Authorization does not have by its face, free of ambiguity, the meaning the district court ascribed to it. We are inclined to the view that on its face it means just the reverse, that the phrase 'to represent the undersigned in collective bargaining negotiations incident to the provisions of the above named contracts and pursuant to reopening notices given under Articles 26, 27 and 36 of the Western States Area Master Freight Agreement' is not a limitation on bargaining authority but a specific incorporation of the provisions of Article 26, 27 and 36 which committed Braswell to national negotiations and a single unit."

Upon consideration of the foregoing, the court is of the opinion that defendant's authorization to bargain encompasses not only the National Master Freight Agreement

but also all applicable supplements, to which the defendant can no longer assert that it is not a party.

With regard to all contentions of the defendant that a card check pursuant to Article 2, Section 3 of the National Master Freight Agreement and similar provisions contained in applicable supplements was required to have been conducted by the plaintiffs to establish their majority representation as a condition precedent to the defendant's obligation to apply the National Master Freight Agreement and applicable supplements, the Court of Appeals disposed of that issue adverse to the defendant in its opinion dated June 28, 1968, pages 2-3:

> "Our conclusion that the contract is applicable to these Teamsters local disposes of the argument of Braswell on rehearing that a retrospective card check is required to determine whether at the time the contract became applicable to the BFL locals these locals in fact represented a majority of the BFL employees, otherwise the employer and the union might be, by contract, imposing on the BFL employees representation by a union that did not represent a majority. The National Labor Relations Board found that the BFL employees were an appropriate unit and ordered Braswell to bargain with these unions as their bargaining agent. 141 NLRB 1154; 154 NLRB 101."

Consequently, the court finds that the plaintiffs on July 1, 1964 represented a majority of those employed by defendant BFL Division who were in the collective bargaining unit, and therefore no card check was required to have been conducted.

With respect to all matters now raised by the Defendant concerning procedures before the National Grievance Committee, the personnel of the committee, the evidence before the committee, and Defendant's opportunity to raise defenses at the committee hearing, the Court is of the opinion

that all such matters seek to go behind the decision of the National Grievance Committee to impeach its judgment. This issue too was decided by the Court of Appeals adverse to the Defendant. The Court of Appeals said in its opinion dated March 25, 1968, at pages 14-15:

> "But this is an argument on the merits of the arbitrable issue, properly to be made before the arbitrable body and not there made. If made, it would come too late in this Court."

Further, the Court of Appeals in its decision dated June 28, 1968, at page 2 said:

> "We have held that these locals are parties to the Agreement by virtue of an arbitrable award to that effect, which award is entitled to enforcement, and have reversed the grant of summary judgment to Braswell."

The Court is therefore of the opinion that the arbitration award of the National Grievance Committee is entitled to enforcement and Defendant's effort to impeach that award comes too late in this Court.

The Court accordingly grants the Plaintiffs' Motion to Strike the Defenses as not timely asserted and not relevant.

Based on the foregoing, it is herewith ORDERED, ADJUDGED AND DECREED that Plaintiffs' Motion to Strike Certain Defenses be, and it is herewith, granted and all defenses and other allegations to which Plaintiffs' motion is directed be, and they are herewith, stricken from Defendant's Second Amended Original Answer.

(b) PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND INJUNCTION:

The Plaintiff has heretofore filed a Motion for Summary Judgment and the Defendant has filed a Counter Motion for Summary Judgment limited to the issue of liability.

This is a suit to enforce the arbitration award of the National Grievance Committee which found that the National Master Freight Agreement and applicable supplements apply to Defendant's BFL Division and have so applied from July 1, 1964, and thereafter. Although the Court of Appeals in its decision dated June 28, 1968, stated at page 2:

> "Further proceedings as to the scope and quantum of relief to which the union may be entitled, and defenses, if any, that Braswell may have, are for the Trial Court in the first instance and not for this Court,"

the Defendants have not raised any issues of fact in their Second Amended Original Answer that are not foreclosed by the opinions of the Court of Appeals dated March 25, 1968, and June 28, 1968. All defenses raised relate to (1) whether the Defendant is a party to the National Master Freight Agreement and applicable supplements, (2) whether a card check was required to be conducted by the unions as a condition precedent to the application of the National Master Freight Agreement and applicable supplements by the Defendant, and (3) the propriety of the procedures followed by the National Grievance Committee. This Court has pointed out at length above that each of these contentions now raised again by the Defendant have been decided adverse to the Defendant's contention. Consequently, there are no issues of fact in dispute and the Plaintiff is entitled to judgment on liability as a matter of law.

At the pre-trial hearing held on November 7, 1969, Defendant asserted additional defenses of Waiver and Termination of the collective bargaining agreement.

Upon consideration of the Affidavit of Hugh Smith there tendered and Defendant's brief on these issues, and the arguments and admissions of counsel, the Court finds that the statements and actions of Plaintiffs' representative at meetings in December, 1966, and thereafter with represen-

tatives of Defendant were in an effort to negotiate changes or revisions in the then current National Master Freight Agreement and applicable supplements and were contemplated by and in accordance with the procedures set out in Article 37, Section 2 of the National Master Freight Agreement and would not constitute a waiver of any rights of Plaintiff, nor were Plaintiffs thereby estopped from asserting any rights, nor would Plaintiffs' actions terminate the National Master Freight Agreement or any supplement thereto.

The Court thereafter permitted Defendant to submit a certain letter dated April 23, 1969, which the Court finds was intended by the Defendant to operate as a Notice of Desire to Cancel or Terminate the Agreement.

The Court finds that said notice was not the result of an inadvertent failure to give notice within the meaning of Section 4 of Article 37, but had legal effect as written notice of desire to cancel or to terminate, effective pursuant to Article 37 on the next anniversary date, i.e. through March 31, 1970, and the Court finds that said notice was effective to provide for termination of said contract and applicable supplements effective March 31, 1970, but not prior thereto.

And the Court further finds that by the provisions of Article 37 of the contract, and the undisputed facts, that Defendant has failed prior to April 23, 1969, to give notice of cancellation as required by the contract, and that accordingly the contract has continued from year to year and will continue in full force and effect through March 31, 1970.

It is therefore ORDERED, ADJUDGED AND DECREED that Plaintiffs' Motion for Summary Judgment on the limited issue of liability be, and it is herewith, granted; that Defendant's Motion for Summary Judgment on the limited issue of liability be, and it is herewith, denied; and that Defendant be, and it is herewith, directed to comply with the provisions of the NMFA and applicable supplements

with respect to its BFL Division from this day until the expiration of said contract, as set out in separate Injunction Order issued contemporaneously herewith.

(c) Plaintiffs' Motion To Refer to Master:

The Plaintiffs have heretofore filed their Motion to Refer to a Master the issues concerning damages. In considering this Motion, the Court is mindful that the Plaintiffs contend that assessment of damages includes the following items:

A. On behalf of individual members within the collective bargaining unit: (1) the difference between wages and other benefits paid by the Defendant to said employees from July 1, 1964, to date and the wages and other benefits that should have been paid to said employees as specified in the National Master Freight Agreement and applicable supplements, (2) repayment by the Defendant to employees who lost wages, benefits and seniority rights by virtue of their having been on strike, all wages, benefits and seniority increment that would have been paid by the Defendant to such employees had a strike not been necessitated to obtain compliance by the Defendant with the National Master Freight Agreement and applicable supplements, (3) all out-of-pocket expenses incurred by employees within the collective bargaining unit caused by the refusal of the Defendant to apply the National Master Freight Agreement and applicable supplements which include, but are not limited to hospitalization and medical expenses paid by each member which resulted from the non-payment of insurance premiums by the Defendant, loss of property through foreclosure caused by decreased earnings necessitated by Defendant's failure to apply the wage provisions of the contract, and pensions due retired and disabled employees that were not paid because of the Defendant's refusal to apply the contract.

B. As to the Plaintiffs unions: (1) strike benefits and strike expenses paid or incurred, (2) dues payable by mem-

bers of the Plaintiffs' local unions and others within the collective bargaining unit including contributions by the Defendant to health, welfare, insurance, and pension fund which were not paid by the Defendant because of its refusal to apply the contract, (3) impairment of the reputation, organizational strength and organizational ability of the Plaintiff local unions, (4) costs of suit, (5) reasonable attorney's fees, and (6) exemplary damages.

The computation of the damages in each of the above categories, is, in the opinion of the Court, extremely complex and would require an inordinate amount of Court time to consider which would cause serious detriment to the Court's calendar, as well as requiring the parties to bring a large number of witnesses to the Court from various locations throughout the southern United States. The Court is therefore of the opinion that a Master should be appointed to determine all factual issues relating to damages, and by separate Order to be entered herein will appoint a special Master under the terms and possessing the powers there provided.

ENTERED at El Paso, Texas, this 8th day of November, 1969.

(Signed) D. W. SUTTLE
D. W. Suttle,
United States District Judge

Findings of Fact and Conclusions of Law of the District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

No. 28,926

TEAMSTERS LOCAL UNIONS, 745, 47, 886, 523, 270, 5, 568, 667 and 891, *Appellants*,

v.

BRASWELL MOTOR FREIGHT LINES, INC., *Appellee*.

(Filed: Nov. 8, 1969)

On November 7, 1969, this cause came on to be heard on motion of Plaintiff for a Summary Judgment, interlocutory in character, on the issue of liability pursuant to Rule 56 of the Federal Rules of Civil Procedure, and for mandatory injunction, and requesting separate trial of the damage issues, pursuant to Rule 42, Federal Rules of Civil Procedure, for which Plaintiffs have moved the Court to appoint a Special Master to take evidence and report to the Court on damages sustained by the Plaintiffs; and the Court having considered the pleadings, the affidavits, exhibits and depositions filed herein, the arguments and briefs of counsel, including admissions therein made, and the whole record herein, and the Court makes the following findings of fact and conclusions of law:

Findings of Fact

1.

This is a suit brought by various Teamsters Local Unions (a) to enforce an arbitration award entered on November 5, 1964, by the National Grievance Committee established by the National Master Freight Agreement and applicable supplements dated January 16, 1964, which arbitration award determined that the said National Master Freight Agreement

> "... require[s] Braswell Motor Freight Lines [to] apply the National Master Freight, Road and Local

> Cartage Agreements and supplements thereto to the operations formerly known as Braswell Freight Lines Corporation and now merged into Braswell Motor Freight Lines Corporation."[1]

and (b) for damages resulting from defendant's refusal to comply with said award.

2.

Plaintiffs[2] are labor organizations representing employees for purposes of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, and conditions of work, and each is a "labor organization" within the meaning of 29 U.S.C.A. § 152(5).[3]

3.

Defendant, a common carrier motor carrier, is a corporation authorized to do business in Texas. Its principal office is located in the City of Dallas, Dallas County, Texas. It is an "employer" within the meaning of 29 U.S.C.A. § 152(2) and its operations affect interstate commerce within the meaning of 29 U.S.C.A. § 152(7).[4]

4.

Defendant is a party to the National Master Freight Agreement covering over-the-road and local cartage employees of private, common, contract and local cartage

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[1] Printed Record (before Court of Appeals) pp. 48-49.

[2] Teamsters Local Unions 745 (Dallas); 47 (Ft. Worth); 886 (Oklahoma City); 523 (Tulsa); 270 (New Orleans); 5 (Baton Rouge); 568 (Shreveport); 667 (Memphis); and 891 (Jackson).

[3] Complaint Par. 2; admitted, Defendant's Second Amended Original Answer par. 10.

[4] Complaint Par. 3; admitted, Defendant's Second Amended Original Answer Par. 11; see also, Slip Opinion, Court of Appeals, March 25, 1968, p. 2.

carriers (hereinafter referred to as "National Master Freight Agreement") and applicable supplements.[5]

Defendant admits that its "Western Division" is a party to the National Master Freight Agreement and applicable supplements but asserts that said agreement only applies to its Western Division.[6]

5.

The National Master Freight Agreement and applicable supplements were negotiated and executed on behalf of the defendant by Trucking Employers Inc., the designee of California Trucking Association, pursuant to the following "company authorization to represent" dated November 30, 1963:[7]

"Company Authorization to Represent:

"The undersigned, party to Western States Area Master Freight Agreement and Western States over-the-road single man and sleeper cab supplemental agreement, which agreements are in effect through June 30, 1964, does hereby authorize the California Trucking Association and/or any other trucking employer group or committee designated by the California Trucking Association to represent the undersigned in collective bargaining negotiations incident to the provisions of the above-named contracts and pursuant to reopening notices given under Articles 26, 27 and 37 of the Western States Area Master Freight Agreement.

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[5] Appendix A to Complaint; see affidavits of Einar Mohn and S. E. Mansfield, Slip Opinion, Court of Appeals, March 25, 1968 at pages 13-15.

[6] Defendant's Second Amended Original Answer Par. 12(b); Braswell Affidavit page 2.

[7] Printed Record page 65.

"This authorization shall continue in full force and effect until written revocation hereof is made by certified mail to California Trucking Association at 3301 South Grand Ave., Los Angeles 7, California."

6.

The Court concludes that the above quoted "authorization to represent" fully authorized Trucking Employers Inc., to negotiate the National Master Freight Agreement and applicable supplements as agent for the defendant, and to provide therein for a national bargaining unit, applicable to all of defendant's operations.[8]

7.

Each of the plaintiff unions in the fall of 1963 authorized the National Over-the-Road and City Cartage Policy Negotiating Committee to negotiate a national collective bargaining agreement with those employers (including defendant) who were represented in said national negotiations.[9]

8.

That pursuant to the powers of attorney executed by plaintiff local unions (along with hundreds of other local unions throughout the nation) and the powers of attorney executed by defendant Braswell Motor Freight Lines, Inc. (along with hundreds of other employers throughout the nation), negotiations were conducted in Chicago, Illinois, in December 1963 and January 1964 which culminated in an agreement executed on January 16, 1964, known as the

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[8] See Slip Opinion, Court of Appeals, March 25, 1968, at page 15:

"While what we have said is dispositive of the case, we point out that we do not agree with the district court's conclusion that the authorization itself forever limited Braswell's participation in the agreement to its western division."

[9] See affidavit of M. R. Dixon, pages 2-3, and the plaintiff union's authorization attached thereto marked Exhibit B Slip Opinion, Court of Appeals, June 28, 1968, page 2.

National Master Freight Agreement and Applicable Supplements."[9]

9.

The National Master Freight Agreement, referred to above, and the several supplemental agreements, constitute one contract which was bargained for by the respective union and employer negotiating committees referred to above and executed by them on January 16, 1964, as one contract.[11] The National Master Freight Agreement applies throughout the nation and the various supplemental agreements apply in specific geographic areas stated in each supplemental agreement.[12]

10.

The National Master Freight Agreement applies in the geographic area in which the several plaintiffs and defendant's BFL Division are situated, and the following supplemental agreements principally apply in the geographic area wherein the several plaintiffs are situated and defendant's BFL Division maintains terminals or operations:

(A) Southwestern Area Local Cartage Supplemental Agreement, covering employees of private, common, contract and local cartage carriers in the states of Arkansas, Louisiana, Oklahoma and Texas;

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[9] Dixon affidavit, para 7, p. 3; Mohn affidavit, para, 1-12, pp. 4-5; Mansfield affidavit, pp. 3-4; Deposition of M. W. Miller, pp. 15, 26, 60; deposition of M. Ralph Dixon, p. 23.

[11] Deposition of M. Ralph Dixon, p. 141, line 19, to p. 142, line 1; See, executed copy of original contract, Deposition of M. W. Miller, Exhibits 1-5.

[12] See Plaintiffs' Answer to Defendant's Interrogatory No. 7. The Supplemental Agreements applicable in the geographic area in which defendant's BFL Division maintains operations and terminals are attached as Exhibits A-F to Plaintiffs' Answers to Defendant's Interrogatory No. 7.

(B) Southwestern Area Over-the-Road Supplemental Agreement, covering over-the-road operations in the states of Arkansas, Louisiana, Oklahoma and Texas;

(C) Southeastern Area Local Cartage Supplemental Agreement covering employees of private, common, contract and local cartage carriers in the states of Alabama, Florida, Georgia, Kentucky (excluding Louisville), Mississippi, Tennessee, Cincinnati, Ohio, and New Orleans, Louisiana;

(D) Southeastern Area Over-the-Road Supplemental Agreement covering over-the-road operations in the states of Alabama, Florida, Georgia, Kentucky (excluding Louisville), Mississippi, Tennessee, Cincinnati, Ohio, and New Orleans, Louisiana;

(E) Central States Area Local Cartage Supplemental Agreement covering private, common, contract and local cartage carriers in the states of Michigan, Ohio, Indiana, Illinois, Wisconsin, Minnesota, Iowa, Missouri, North Dakota, South Dakota, Nebraska, Kansas, Kentucky, West Virginia and Denver, Colorado;

(F) Central States Area Over-the-Road Supplemental Agreement covering over-the-road operations in the states of Michigan, Ohio, Indiana, Illinois, Wisconsin, Minnesota, Iowa, Missouri, North Dakota, South Dakota, Nebraska, Kansas, Kentucky, West Virginia, and Denver, Colorado.[18]

11.

The effective period of The National Master Freight Agreement and specific supplemental agreements referred to above was from the effective date in 1964 stated therein, extending to March 31, 1967 and, by Article 37 "continu[ing] from year to year thereafter unless written notice

[18] Id; Deposition of M. Ralph Dixon, pp. 143-147; Defendant has not denied the applicability of the supplements listed in the geographic areas specified.

of desire to cancel or terminate the Agreement is served by either party upon the other at least sixty days prior to the date of termination."[14]

12.

No evidence has been presented to the Court by the defendant to indicate that the aforesaid National Master Freight Agreement and applicable supplements was terminated at any time; the Court finds that the National Master Freight Agreement and applicable supplements are now in full force and effect and have been at all times from February 1, 1964 to date and continuing hereafter from day to day to the extent applicable to the defendant.[15]

13.

On July 1, 1964, the operation formerly known as "Braswell Freight Lines" was merged into the defendant as its BFL Division and, at that time, was a "subsequently acquired operation and terminal" as that term is employed in Article 3(a) of the National Master Freight Agreement.[16]

14.

The National Master Freight Agreement by its terms "shall apply to all present and subsequently acquired operations and terminals of the employer" by Article 3(a) thereof. Article 2, Section 1 thereof specifies the contract coverage of "all operations of the employer . . . "; and by paragraph 3(a), last paragraph thereof, states that "the

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[14] See Exhibits A-F attached to Plaintiffs' Answers to Defendant's Interrogatories; Deposition of M. W. Miller, Exhibit 2, last page thereof.

[15] M. W. Miller Deposition, pp. 121-122.

[16] See Defendant's Second Amended Original Answer, para. 7; Slip. Opinion, Court of Appeals, March 25, 1968, p. 2:

> "Braswell acquired through merger with a wholly owned subsidiary (Braswell Freight Lines, Inc., hereinafter "BFL") an additional operation . . ."

provisions of this agreement shall apply to all accretions to the bargaining unit . . . "

15.

On January 20, 1964, four days after the execution of the National Master Freight Agreement, defendant applied to the Interstate Commerce Commission for authority to merge Braswell Freight Lines into defendant. The Interstate Commerce Commission authorized the merger which was effected July 1, 1964, and at all times on and after July 1, 1964 defendant has owned, operated and managed this operation merged into defendant.[17]

16.

The jurisdiction to determine majority and representation status of labor organizations is vested exclusively in the National Labor Relations Board by Section 9 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C.A. § 159.

The N.L.R.B. has found that at all times material herein plaintiff local unions represented a majority of defendant's employees in its BFL Division.[18] The N.L.R.B. has re-

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[17] I.C.C. Order May 5, 1964, Case MC-F-8655; cf. Braswell's counsel's admissions at argument, Tr. page 124, hearing of March 24, 1965.

[18] See 141 NLRB 1155 at 1159 (1963):

"2. The Union's Majority Status:

"Respondent would not stipulate majority status but put the union to its proof. I find on the basis of the uncontradicted testimony of the various union officials from the locals involved, who testified with their books and records before them, that the union represents a majority of employees in the unit found appropriate and did so in April, 1962, when the strike was called. The basic data is set forth in the following chart:" (There follows at page 1168 a chart specifying the location and union status of each of the BFL employees showing Road—68 employed, 57 union; Mechanics—6 employed, 5 union; Office employees—15 employed, 11 union; City—130 employed, 129 union).

affirmed this determination in its final Decision and Order of July 30, 1965, in the matter of Braswell Freight Lines, et al., Case No. 16CA-1648; 154 NLRB No. 20. There the NLRB again found that "at all times material, the union [the plaintiffs in the instant suit] has been the exclusive bargaining representative for the employees . . ." in the bargaining unit here involved.[19]

The Court of Appeals by its decision dated June 28, 1968,[20] held that the above quoted decisions of the National Labor Relations Board establish plaintiffs' representation as exclusive collective bargaining agent of those within the collective bargaining unit of defendant's BFL Division.

17.

Although defendant since July 1, 1964, has acknowledged the binding effect of, and has applied to its Western operations,[21] defendant, at all times since July 1, 1964, has failed and refused, and continues to fail and refuse to apply the terms and conditions of the said National Master Freight Agreement and applicable supplements to that portion of its operations formerly known as "Braswell Freight Lines" and now known as defendant's "BFL Division," i.e., that portion of the system operating east and north of Dallas, Texas.[22]

18.

Plaintiffs on October 1, 1964, invoked the procedure for dispute settlement provided in the National Master Freight Agreement by filing with the "National Grievance Committee", a body composed of five employer and five em-

[19] 141 N.L.R.B. 1155 at 1159, enforced, 370 F.2d 226 (D.C.Cir. 1966).

[20] Slip Opinion, Court of Appeals, June 28, 1968, p. 3.

[21] Defendants Second Amended Original Answer, Para. 12(b); Braswell affidavit p. 2; Braswell's counsel's statement, Tr. p. 123 ff.

[22] Complaint, Para. 6; Braswell affidavit, p. 3.

ployee representatives, the "Request for Interpretation of National Master Freight Agreement: Southern Conference of Teamsters-Braswell Motor Freight Lines, Inc.," as follows:

"The Southern Conference of Teamsters and affiliated Locals 745 (Dallas, Texas), 47 (Ft. Worth, Texas), 886 (Oklahoma City, Oklahoma), 523 (Tulsa, Oklahoma), 270 (New Orleans, Louisiana), 5 (Baton Rouge, Louisiana), 568 (Shreveport, Louisiana), 667 (Memphis, Tennessee), and 891 (Jackson, Mississippi) protest the failure of Braswell Motor Freight Lines, Inc. (hereinafter BMFL), to apply the provisions of the National Master Freight Agreement and Supplements thereto to the operations and terminals of Braswell Freight Lines (hereinafter BFL) which it acquired by the May 5, 1964 Order of the I.C.C. (MC-F-8655), caption Braswell Motor Freight Lines, Inc.-Merger-Braswell Freight Lines, Inc.)

"FACTS

"On January 20, 1964 (four days after the signing of the National Master Freight Agreement) BMFL applied to the I.C.C. for authorization that the operating rights and properties of BFL be merged into BMFL for ownership, management and operation. By order dated May 5, 1964, this authorization was granted. See May 5, 1964 order of I.C.C. in Case MC-F-8655, made a part hereof. And on July 1, 1964 BMFL commenced operations of the BFL facilities, and at all times since that date BFL has been merged into BMFL, Inc., for ownership, management and operation.

"Unions affiliated with Southern Conference of Teamsters (specified in paragraph 1 above) were on and prior to July 1, 1964 the exclusive bargaining representative of the BFL employees. The NLRB so found in Case 16-CA-1648. BFL employees were then, and continued to be on strike protesting BFL failure to bargain. No decertification proceedings have been in-

stituted. Unions thus continue to be the exclusive bargaining agent for such employees.

"BMFL (a party to the National Master Freight Agreement by virtue of power of attorney dated Nov. 30, 1963, copy attached hereto) has failed to apply the terms of the National Master Freight Agreement to the BFL operations which it acquired.

"THE PERTINENT CONTRACT LANGUAGE

"By Art. 3(a), 'the employer (BMFL) recognizes and acknowledges that the National Union Committee and Local Unions affiliated with the International Brotherhood of Teamsters are the exclusive representatives of all employees in the classifications of work covered by this Master Agreement, and Supplements thereto for the purposes of collective bargaining as provided by the NLRA . . . ' this provision shall apply to all present and subsequently acquired operations and terminals of the employer . . .[23]

"Art. 2, Sec. 1 makes specific the contract coverage of 'all operations of the employer . . . ' and 'application to the work performed within the classifications defined and set forth in the agreements supplemental hereto.' Additionally, Art. 3(a) last paragraph, is specific that:

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[23] The exception from coverage is not here applicable, viz: "This provision shall not apply to wholly owned and wholly independently operated subsidiaries which are not under contract with Local IBT unions" cannot relieve BMFL of responsibility for the operations here in question are not "wholly independently operated." To the contrary, there has been an acquisition by BMFL of all BFL rights, properties, employees and operations, and a merger of BFL into BMFL. There is, and has been since July 1, 1964, interchange of freight, equipment, personnel and common use of equipment, terminals, property, personnel and I.C.C. rights. See definition of "wholly independently operated," last sentence in first paragraph of Article 3(a).

'The provisions of this agreement shall apply to all accretions to the bargaining unit . . .'

"The only possible question as to the application of the contract to the BFL operations, acquired by BMFL, occurs in Article 2, Sec. 3, which specifies certain types of operations to which the agreement shall not be applicable.[24] Under the heading, 'Non-covered Units' it appears that (1) operations where employees are covered by a contract with a non-signatory union, or (2) or employees who have not designated a signatory union, are not to be covered by this Agreement.

"Neither exception is here applicable. (1) The BFL employees are not covered by a contract with a non-signatory union;[25] and (2) as demonstrated above, the BFL employees have designated Teamsters, NLRB has so found.[26]

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[24] Article 2, Section 3 provides:

"This Agreement shall not be applicable to those operations of the Employer where the employees are covered by a collective bargaining agreement with a Union not signatory to this Agreement or to those employees who have not designated a signatory Union as their collective bargaining agent. At such time as a majority of such employees in an appropriate bargaining unit designate, as evidenced by a card check, a signatory Union as their collective bargaining agent, they shall automatically be covered by this Agreement and applicable Supplemental Agreement. In such cases the parties may by mutual agreement work out a wage and hour schedule, subject to Joint Area approval."

[25] Slip Opinion, Court of Appeals, June 28, 1968, p. 2 wherein the Court held that the plaintiff local unions became parties to the National Master Freight Agreement and applicable supplements at the time they were executed.

[26] The Court of Appeals has further confirmed the status of the plaintiff local unions as exclusive collective bargaining agent for the BFL employees and has indicated that a retrospective card check required by Article 2, Section 3 is not applicable in this

"In sum, the Master contract applies to all BMFL operations (specifically, '. . . shall apply to all present and subsequently acquired operations and terminals of the employer.'). Only two exceptions appear. The expression of two specific exceptions negative the existence of any other exceptions. Neither expressed exception here applies. Accordingly, the National Master Freight Agreement and supplements apply.

"This matter is referred to the National Grievance Committee by the undersigned Union Area Director pursuant to Article 8(b) of the National Master Freight Agreement.[27] It is requested that the National Grievance Committee consider the questions of interpretation arising under the aforesaid provisions contained in the Master Agreement and determine that BMFL is required to apply the National Master Freight Agreement and Supplements to all operations

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case. See, Slip Opinion, Court of Appeals, June 28, 1968, pages 2-3:

> "Our conclusion that the contract is applicable to these Teamsters locals disposed of the argument of Braswell on rehearing that a retrospective card check is required to determine whether at the time the contract became applicable to the BFL locals these locals in fact represented a majority of the BFL employees, otherwise the employer and the union might be, by contract, imposing on the BFL employees representation by a union that did not represent a majority. The National Labor Relations Board found that the BFL employees were an appropriate unit and ordered Braswell to bargain with these unions as their bargaining agent. 141 NLRB 1154; 154 NLRB 101."

[27] Article 8(b) authorizes this direct reference to the National Grievance Committee. It provides:

> "(b) The National Grievance Committee by majority vote may consider and review all questions of interpretation which may arise under provisions contained in the Master Agreement which are submitted by either Union Area Director or the designated employer representative"; Complaint, paragraph 7.

formerly performed by BFL and all work performed within the classifications defined and set forth in the agreement supplemental to the National Master Freight Agreement.

"Expeditious determination of this matter is urged as an avenue of settlement of the current strike.

(Signed Murray W. Miller, Chairman and Area Director on behalf of the Southern Conference of Teamsters and Affiliated Local Unions 745, 47, 886, 523, 270, 5, 568, 667 and 891." [28]

19.

The National Grievance Committee established by the National Master Freight Agreement is "composed of five members designated by the employers and five members designated by the unions." [29] It meets "quarterly for the disposition of grievances referred to it, or may meet at more frequent intervals upon call of either Chairman, etc." [30] The same contract, Article 8(b) authorizes references of such matters to the National Grievance Committee, viz:

"(b) The National Grievance Committee by majority vote may consider and review all questions of interpretation which may arise under the provisions contained in the Master Agreement which are submitted by either the Union Area Director or the designated Employer representative."

The contract is specific that:

"If the National Grievance Committee resolves the dispute by majority vote of those present and voting,

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[28] See, Complaint, paragraph 7 and Appendix B attached thereto.

[29] Article 8(a) (2).

[30] Ibid.

SUCH DECISION SHALL BE FINAL AND BINDING ON THE PARTIES." (emphasis added).[31]

Again, the contract is explicit:

"The undersigned employer agrees to become a part of the multiple-employer unit established by this National Agreement, AND TO BE BOUND BY THE INTERPRETATIONS AND ENFORCEMENT OF THIS NATIONAL MASTER AGREEMENT." (emphasis added).[32]

20.

Thereafter, on October 14, 1964, the following joint notice was sent by the employer and union's secretaries of the National Grievance Committee to each plaintiff and to defendant:[33]

"Gentlemen:

"Enclosed request for interpretation of the National Master Freight Agreement has been filed with the undersigned secretaries of the National Grievance Committee by the Southern Conference of Teamsters and its affiliated Locals 745, 47, 886, 523, 270, 5, 568, 667 and 891 with respect to Braswell Motor Freight Lines.

"This will notify you that pursuant to the applicable provisions of Article 8 of the National Master Freight Agreement, the National Grievance Committee will meet in the Michigan Room, Statler Hilton Hotel, 16th and K Streets, N.W., Washington, D.C., on November 5, 1964, at 10:00 a. m. to act upon the request.

"As an interested party, you are advised and urged to attend this meeting and to present to the National

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[31] Art. 8(a) (2) last sentence of first paragraph.

[32] Art. 31.

[33] Complaint, paragraph 8a; admitted, Defendant's Second Amended Original Answer, paragraph 16.

Grievance Committee any evidence and argument you may wish to advance in support of your position on the issues involved. Please note that because the issues involved are in large part legal in nature, you may have an attorney present to represent you in this matter and the attorney may participate fully in the proceeding."

21.

Defendant, by letter dated November 4, 1964, filed the following written "Special Appearance" with the National Grievance Committee:[34]

"Special Appearance Before the National Grievance Committee.

"Comes now Braswell Motor Freight Lines, Inc., and makes this its special and limited appearance before the National Grievance Committee meeting in called session to renew a request for interpretation of the National Master Freight Agreement affecting Braswell Motor Freight Lines, Inc., said grievance filed by Murray W. Miller in behalf of the Southern Conference of Teamsters and affiliated Local Unions 745, 47, 886, 523, 270, 5, 568, 667 and 891.

"Under date of October 14, 1964, Braswell Motor Freight Lines, Inc., has been advised of a request for interpretation of National Master Freight Agreement filed by Murray W. Miller, Chairman and Area Director of the Southern Conference of Teamsters. Braswell Motor Freight Lines, Inc. makes this special and limited appearance in this proceeding for the sole and only purpose of challenging the jurisdiction of the Committee to act, in that all matters outlined and contained in the Southern Conference request for interpretation of the National Master Freight Agreement,

[34] Complaint, paragraph 9; admitted, Defendant's Second Amended Original Answer, paragraph 17.

even the matter of employees' representation are by statute within the exclusive jurisdiction of the National Labor Relations Board and are now pending before the Board in Case No. 16-CA-1648 and therefore such matters are not properly before this tribunal.

"This special and restricted appearance is made on and in behalf of Braswell Motor Freight Lines, Inc., by its attorneys undersigned herein. (Signed) Christopher & Bailey and Allen P. Schoolfield, Jr., Schoolfield & Smith, Attorneys for Braswell Motor Freight Lines, Inc., 1200 Republic National Bank Building, Dallas, Texas 75201."

The Court finds that the defendant made no personal appearance before the National Grievance Committee and did not challenge the merits of the union's claim before the said arbitral body, but only asserted a challenge to the Committee's jurisdiction.[35]

22.

The Court finds that Article 8(b) of the National Master Freight Agreement authorized the National Grievance Committee to consider and renew the reference made to it by the plaintiff local unions set forth above, and the said National Grievance Committee had jurisdiction to determine the merits of same.[36]

23.

The Court finds that the dispute raised by the "Request for Interpretation", referred to in Paragraph 18 above, was a matter of interpretation under Article 8 of the National Master Freight Agreement and was an arbitrable issue as found by the Court of Appeals in its decision dated March 25, 1968, at pages 13-14.

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[35] Minutes of National Grievance Committee, November 5, 1964, page 8; Exhibit 2, attached to Defendant's First Amended Answer.

[36] Slip Opinion, Court of Appeals, March 25, 1968, page 8.

24.

The Court finds that the National Master Freight Agreement and applicable supplements are susceptible of the construction given them by the National Grievance Committee, i.e., that Articles 1, 2 and 3 of the National Master Freight Agreement require defendant to apply the National Master Freight Agreement and applicable supplements to its BFL Division. Any one or all of the following provisions is subject to construction supporting the decision of National Grievance Committee:

(a) Article 1, Section 1 provides that the National Master Freight "Agreement and Supplemental Agreements" are binding on all parties thereto;

(b) Article 2, Section 1 specifies coverage of "all operations of the employer . . . " ;

(c) Article 3(a) extends coverage to "all accretions to the bargaining unit . . . " and "all present and subsequently acquired operations and terminals" of the employer.

25.

The Court further finds that the extent and scope of the "authorization to bargin" given by the defendant to California Trucking Association and its designee, Trucking Employers, Inc., was a matter of interpretation under Article 8 of the National Master Freight Agreement, and was therefore an arbitrable issue.[37]

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[37] Slip Opinion, Court of Appeals, March 25, 1968, at pages 13-14:

> "The District Court treated as disposing of the case its conclusion that the authority Braswell granted to contract was only as to units in its Western Division, so that the Agreement, as and when negotiated, established at that time no employer-employee collective bargaining relationship between Braswell and the BFL locals. But, applying the above

26.

The National Master Freight Agreement provides in paragraph 3(a) for certain exceptions from coverage, viz:

> "This provision shall not apply to wholly owned and independently operated subsidiaries which are not under contract with local IBT."

On and after July 1, 1964, Braswell Freight Lines was not a "wholly independently operated subsidiary" within this contract language.[as] Accordingly, this exception to contract coverage does not serve to relieve defendant of obligation under this contract.

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established principles of law to this case, the District Court's conclusion does not answer the question of whether employees serving an operation or terminal subsequently acquired or established are to be brought within the Agreement only if their bargaining agent is one of the Western Division locals already under contract. The Agreement contemplates that acquisition or establishment of *some* terminals and operations will extend the coverage of the agreement. Without our assigning weight to any of them, there are many facts and circumstances that could aid in determining whether the agreement means what Braswell concludes it means or what the BFL locals conclude it means—many terms of the agreement itself, the history of industrial strife involving the BFL locals and J. V. Braswell and both Braswell companies, the recognized intent of the Teamsters to achieve a multi-employer unit, the expressed intent that the agreement to apply to some newly acquired facilities, the fact that the BFL locals are themselves parties signatory to the agreement, the traditional meanings of 'bargaining unit' and 'accretion'. We cannot [say] with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *United Steelworkers* [v. American Mfg. Co., 363 U.S. 564, 567-68, 80 S.Ct. 1343, 4 L.ed.2d 1403, 1407 (1960)], *supra. We hold that the dispute was a matter of interpretation under Article 8* and an arbitrable issue." [emphasis added].

[as] Appendix B to Complaint; Orders of I.C.C. Case MC-F-8655 dated May 5, 1964.

27.

The Court further finds that any and all disputes concerning the aforesaid section are matters of interpretation under Article 8 and are therefore arbitrable issues.

28.

A further exception from National Master Freight Agreement coverage provided in Article 2, Section 3 which states:

> "This Agreement shall not be applicable to those operations of the employer where the employees are covered by a collective bargaining agreement with a union not signatory to this agreement or to those employees who have not designated a signatory union as their collective bargaining agent. At such time as a majority of such employees in an appropriate bargaining unit designate, as evidenced by a card check, a signatory union as their collective bargaining agent, they shall automatically be covered by this Agreement and applicable supplemental agreements. In such cases the parties may by mutual agreement work out a wage and hour schedule, subject to Joint Area approval."

The BFL employees are not "covered by a collective bargaining agreement with a union not signatory to the agreement."[39]

The BFL employees are not "employees who have not designated a signatory union as their collective bargaining unit." To the contrary, the National Labor Relations Board has twice found that these employees have designated the plaintiff local unions as their collective bargaining agents.[40]

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[39] Braswell Affidavit p. 10.

[40] See Footnote 18.

Accordingly, this exception to the contract coverage does not serve to release the defendant of obligation under this contract.

The Court further finds that all disputes related to the aforesaid provision are matters of interpretation under Article 8 and are therefore arbitrable issues.

29.

None of the facts hereinabove set forth were challenged before the National Grievance Committee by the defendant. That committee on November 5, 1964, conducted a full and fair hearing,[41] after due notice to defendant. Defendant chose not to attend the hearing; it cannot now complain that it chose to stay away.[42]

No Braswell representative appeared at the hearing.[43] Braswell's written "special appearance" was noted and made a part of the record;[44] thereafter the Committee unanimously determined "to proceed to the merits of the matter before us."[45] The employer members of the Committee "had a general discussion, thoroughly reviewing some happenings of the national negotiations."[46] Thereupon, on the basis of "the documents before you," i.e., the written union's submission, and the Braswell's "special appearance", the Committee unanimously determined:

> "That the intent, purpose and meaning of Articles 1, 2, and 3 of the National Master Freight Agreement

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[41] See Transcript of Hearing, Exhibit 2 attached to Defendant's First Amended Answer.

[42] *Meatcutters* v. *Penobscot Poultry*, 200 F.Supp. 879; *Boot & Shoe Workers* v. *Faith Shoe Co.*, 201 F.Supp. 234; See, Slip Opinion Court of Appeals, March 25, 1968, Footnote 9.

[43] Transcript of Hearing, pages 8-9, Exhibit 1, attached to Defendant's Answer.

[44] Ibid., page 10.

[45] Ibid., page 10.

[46] Ibid., page 11.

as applied in this case require Braswell Motor Freight Lines apply the National Master Freight, Road, and Local Cartage Agreements and supplements thereto to the operation formerly known as Braswell Freight Lines Corporation and now merged into Braswell Motor Freight Lines Corporation."

Formal notice of the award was thereafter, on November 9, 1964, communicated to Braswell by letter jointly signed by employer and union committeemen.[47] Defendant has at all times refused to comply with this award.

The Court further finds that the aforesaid proceedings and award of the National Grievance Committee were conducted and made in accordance with the applicable provisions of the National Master Freight Agreement and applicable supplements, that the defendant was given full and fair notice of the nature of the charge, that the defendant was given a full and complete opportunity to present its position and views to the National Grievance Committee but declined to do so, that the hearing conducted by the National Grievance Committee was in all respects fair and regular, and that the award issued by the National Grievance Committee was made after full consideration of the merits of the dispute.

28.

The National Master Freight Agreement and applicable supplements upon which this suit is brought provides that decisions of the National Grievance Committee "shall be final and binding on the parties."[48]

29.

The plaintiffs have petitioned the Court for damages resulting from the defendant's failure to apply the provisions of the National Master Freight Agreement and

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[47] See Exhibit C attached to Dixon affidavit.

[48] See Articles 8(a) (2) last sentence of first paragraph, and 31.

applicable supplements to its BFL Division from July 1, 1964 and continuing to such time as defendant complies with the provisions thereof. The damages sought by the plaintiffs on their own behalf include repayment of sums expended for strike benefits and expenses, dues payable by members including contribution by the defendant to health, welfare, insurance and pension funds, impairment of reputation, organizational strength and ability, costs of suit, reasonable attorney's fees, and exemplary damages. Plaintiffs, in their capacity as exclusive collective bargaining agents for and on behalf of those within the collective bargaining unit, assert damages which include wage and benefit differentials, lost wages, benefits and seniority right benefits, and out of pocket expenses incurred by members which would have been paid for them from benefits to which the collective bargaining agreement would have entitled them had it not been for defendant's refusal to comply with the provisions thereof.

The Court finds that these issues relating to damages are complicated and that justice would be served by the appointment of a master to consider same, take evidence thereon, and report to the Court.

30.

The Court further finds that the defendant is in continuing violation of the award made by the National Grievance Committee referred to above and should be enjoined and directed to comply with the provisions of the National Master Freight Agreement and applicable supplements stated above from this day until such time as said agreements are terminated in accordance with the provisions thereof.

A. The Court further finds that the letter dated April 23, 1969, operated as written notice of desire to cancel or terminate the Agreement pursuant to Article 37 thereof, to be effective at the next anniversary date, i.e. March 31,

1970, and not prior thereto. The Court further finds that, as matter of law, failure to submit written notice of desire to terminate the Agreement prior to April 23, 1969, could not have been inadvertant within the meaning of Section 4 of Article 37. The Court therefore finds that the Agreement and supplements thereto continue effective as to Plaintiff and Defendant to and including March 31, 1970.

Conclusions of Law

1.

This Court has jurisdiction pursuant to 29 U.S.C.A. Section 185.

2.

Plaintiffs are labor organizations, and defendant is an employer within the meaning of 29 U.S.C.A. Section 152 (5) and (2), respectively. Defendant's operations affect interstate commerce within the meaning of 29 U.S.C.A. Section 152 (6).

3.

Plaintiffs and defendants are parties to, and bound by, the provisions of the National Master Freight Agreement and applicable supplements, which is a contract between employers and labor organizations within the meaning of 29 U.S.C.A. Section 185.

4.

The National Grievance Committee had jurisdiction and power to interpret and apply the National Master Freight Agreement, and to determine whether defendant was required by that agreement to apply the National Master Freight Agreement and applicable supplements to the operation formerly known as Braswell Freight Lines Corporation and now merged into Braswell Motor Freight Lines Corporation as its BFL Division.

5.

Plaintiffs made a claim which on its face is governed by the National Master Freight Agreement and applicable supplements in presenting to the National Grievance Committee its claim that defendant was required by the National Master Freight Agreement and applicable supplements to apply said agreements to all operations formerly known as Braswell Freight Lines, now known as defendant's BFL Division.

6.

The National Master Freight Agreement and applicable supplements are susceptible of the construction given it by the National Grievance Committee, and this Court does not have authority to reconsider the merits of the grievance since the parties have agreed to binding arbitration.

7.

The award of the National Grievance Committee is entitled to enforcement and defendant is bound to apply the terms of the National Master Freight Agreement and applicable supplements to its BFL Division. Defendant is herewith Directed and Ordered to apply the terms of the National Master Freight Agreement and applicable supplements listed in Paragraph 10 above to its BFL Division immediately.

8.

The Court further finds that the issues related to damages are complicated, the resolution of which would be inordinately cumbersome and time consuming if conducted before the Court, and that justice will be served by the appointment of a master to hear, take evidence, and report to the Court his conclusions relating to damages.

Findings and Conclusions on Defendant's Defensive Issues

1.

This case is not a matter for the exclusive jurisdiction of the National Labor Relations Board. The existence of a remedy before the National Labor Relations Board for an unfair labor practice does not bar suit under Section 301 (29 U.S.C.A., Section 185) for breach of a labor management and arbitration award.[49]

2.

The decisions of the National Labor Relations Board in Braswell Motor Freight Lines, Inc., Braswell Freight Lines, Inc., and J. V. Braswell, an individual, Case No. 16-CA-1648 (April 9, 1963), 141 NLRB 1155, and Supplemental Decision and Order, July 30, 1964, 154 NLRB No. 20, establish plaintiffs' majority status as exclusive collective bargaining representative, and are *res judicata* to the issues of majority status. The determinations of questions of representation and majority status under Section 9 of the Labor Management Relations Act of 1947 (29 U.S.C.A. 159) are within the jurisdiction of the National Labor Relations Board and the Board's findings as to such issues are deemed binding on this Court.

Accordingly, the plaintiffs' majority status as exclusive collective bargaining representative is established, and defendant's contentions based on assertions that plaintiffs lack such status must be denied.

3.

The Defendant's contentions with respect to compliance by the Plaintiffs with various provisions of the National

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[49] *Carey* v. *Westinghouse*, 375 U.S. 261 at 268; *Smith* v. *Evening News*, 371 U.S. 195; *International Brotherhood of Firemen and Oilers* v. *Int'l Ass'n.*, 338 F.2d 176 (5 Cir. 1964); *United Steelworkers* v. *American*, 334 F.2d 147 (5 Cir. 1964).

Master Freight Agreement and applicable supplements are all matters referable to the National Grievance Committee, are relevant to the Plaintiffs' claim made before the arbitrable body, and are merged in the award made by the National Grievance Committee, all such defenses must therefore be denied for, as the Court of Appeals stated in its decision dated March 25, 1968, at pages 14-15:

> "But this is an argument on the merits of the arbitrable issue, properly to be made before the arbitrable body and not there made, if made, it would come too late in this Court."

4.

Defendants' claim of procedural irregularity and composition of the National Grievance Committee must be denied because the method for hearing cases and the composition of the arbitrable body was established by the National Master Freight Agreement to which the Defendant assented.

5.

Plaintiffs' statements and actions at meetings held December, 1966, and following, were contemplated by and consistent with a desire to negotiate changes or revisions pursuant to Article 37, Section 2 of the Agreement and do not constitute waiver, estoppel, or termination of the Agreement.

ENTERED this 8th day of November, 1969.

(Signed) D. W. SUTTLE
United States District Judge

Decree for Permanent Injunction

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

No. 2692

TEAMSTERS LOCAL UNIONS, 745, 47, 886, 523, 270, 5, 568, 667 and 891, *Appellants*,

v.

BRASWELL MOTOR FREIGHT LINES, INC., *Appellee*.

(Filed: Nov. 8, 1969)

This cause came on pursuant to notice on November 7, 1969, and the Court having found that Braswell Motor Freight Lines, Inc. is bound by the National Master Freight Agreement and the applicable supplements as found in the award of National Grievance Committee dated November 5, 1964, which agreements and award are applicable to Defendant until March 31, 1970; and the Court having denied Braswell's asserted defenses to the enforcement of said Agreements and award; and the Court having further found that Defendant has failed to comply with such Agreements and award, and unless enjoined, will continue to refuse to comply with said Agreements and award; and it further appearing to the Court that the Plaintiffs and those of Defendant's employees, employed by Defendant on Defendant's Truck Line system East and North of Dallas-Fort Worth, Texas will be irreparably injured by Defendant's continued failure to comply with the said Agreements and award; and the Court by other orders entered this day having provided that damages suffered to this date by reason of failure to comply with said Agreements and award are to be computed to date; and it appearing that unless enjoined, damages will continue to accrue in sums which will not be susceptible of recompense by money damages;

Now Therefore, It Is Ordered, Adjudged and Decreed that the Defendant, Braswell Motor Freight Line, Inc., its officers, agents, servants and employees and attorneys and all those persons in active concert or participation with them be and hereby are required specifically to perform the National Master Freight Agreement and applicable supplements as construed by the National Grievance Committee in its award dated November 5, 1964 providing:

> "Articles I, II and III of the National Master Freight Agreement as applied in this case require Braswell Motor Freight Lines apply the National Master Freight, Road, and Local Cartage Agreements and supplements thereto to the operation formerly known as Braswell Freight Lines Corporation and now merged into Braswell Motor Freight Lines Corporation."

And it is further Ordered, Adjudged and Decreed that Defendant and those persons above named and each of them are permanently enjoined from breaching said National Master Freight Agreement and applicable supplements as construed and applied by the National Grievance Committee and are required forthwith to comply with said agreements and to continue to comply with said agreements through and including March 31, 1970.

Signed and Entered this 8th day of November, 1969.

(Signed) D. W. Suttle
D. W. Suttle
United States District Judge

Findings of Fact and Conclusions of Law of the District Court

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

Civil Action No. 2692

TEAMSTERS LOCAL UNIONS 745, 47, 886, 523, 270, 5, 568, 667 and 891, *Plaintiffs*,

v.

BRASWELL MOTOR FREIGHT LINES, INC., *Defendant*.

(Filed July 7, 1966)

This cause having been fully heard on motions of plaintiffs and defendant for summary judgment on the pleadings, exhibits, affidavits, and orally and on briefs and reply briefs, the Court finds the following undisputed facts, deemed by the Court to be the material and determinative facts:

Findings of Fact

1. Historically, the defendant, a common carrier motor carrier, operations were carried on prior to July 1, 1957, generally from Los Angeles, California, eastward to Dallas and Houston, Texas, via Phoenix, and Tucson, Arizona, El Paso, Pecos, Big Spring, Abilene and Forth Worth, Texas, to Dallas, Texas, and via El Paso and San Antonio, Texas, to Houston, Texas, as well as between Fort Worth and Dallas, Texas, and Houston, Texas.

2. In the operations described next above, the defendant's operations were divided into two divisions, one known and generally referred to as the Western Division which included all operations from Los Angeles, California, to and including El Paso, Texas. Its other division, sometimes called its Texas Division, included operations from El Paso, Texas, eastward to Dallas and Houston, Texas, as above described. See Defendant's undenied pleadings,

Seventh Defense, pp. 9-10, par. (a), (c) and (j); affidavits J. V. Braswell, pp. 2 and 3; H. J. Jones.

3. Plaintiffs herein, and none of them, have never had a labor contract with the defendant in either defendant's Western Division or its Texas Division. Affidavit H. J. Jones.

4. The defendant has had a series of labor contracts with certain local teamsters unions in its Western Division since beginning with June 21, 1949, and continuously since that time. Those labor contracts were negotiated under powers of attorney enumerated as follows and containing limitations as follows:

a. The first, dated June 21, 1949, limited "to apply for the Los Angeles terminal of Braswell Motor Freight Lines only" covering employees in four classifications and with Los Angeles teamsters locals only. Eee Exhibit A, Affidavit of Einor O. Mohn, and also Exhibit A of S. E. Mansfield's affidavit.

b. The second power of attorney is dated February 7, 1951, covering employees in four classifications but limited to certain teamsters locals in "California and Arizona only" but "does not cover El Paso local employees. Only line drivers—Phoenix local and L. A." See Exhibit B attached to the Einor O. Mohn affidavit and Exhibit B attached to the S. E. Mansfield Affidavit.

c. The third power of attorney, dated July 6, 1953, limited to Los Angeles Teamsters Local Unions No. 208 "local wage agreement"; No. 224 limited to "line wage agreement"; No. 357 limited to "local wage agreement, office employees wage agreement (and) fork lift and overhead crane agreement"; and No. 495 limited to "automotive maintenance agreement L. A. only"; and limited to Phoenix, Arizona, Teamsters Locals Nos. 104 and 274 and to "long line wage agreement (and) local wage agreement"; and Tucson, Arizona, Teamsters Local No. 310

limited to "long line wage agreement"; El Paso, Texas, Teamsters Local No. 941 limited to "long line wage agreement," and this applies only to line drivers west out of El Paso to Tucson." See Exhibit C, Einor O. Mohn's Affidavit, and Exhibit C, S. E. Mansfield Affidavit, and Exhibit 3 attached to defendant's first amended original answer.

d. The first referred power of attorney was given to "the Motor Truck Association of Southern California" as defendant's negotiating agent. The second and third referred powers of attorney were given to "Motor Truck Association of California" as defendant's negotiating agent. See Exhibits A, B and C of both the Einor O. Mohn and S. E. Mansfield Affidavits, and Exhibit 3 attached to defendant's first amended original answer.

e. By succession of changes of name, the Motor Truck Association of Southern California is now known as California Trucking Association.

5. The power of attorney dated July 6, 1953, "supersedes all prior powers of attorney given by the undersigned (Braswell Motor Freight Lines) to the Motor Truck Association of California relative to collective bargaining with representatives of our (Braswell Motor Freight Lines) employees in the above named wage agreements." See last paragraph third referenced power of attorney.

6. None of the California or Arizona teamsters locals referred to in the third referenced power of attorney are plaintiffs in this proceeding. Compare referenced California and Arizona teamsters local unions against teamsters locals plaintiffs herein.

7. None of the teamsters local unions plaintiffs herein now have or have ever had labor contracts covering employees in defendant's Texas Division.

8. The four referenced powers of attorney, if the two "Authorizations to Represent" are in fact and law powers

of attorney, are the only powers of attorney which defendant has ever given to an agent to represent defendant in labor contract negotiations on behalf of any of its employees. Mansfield's affidavit.

9. The power of attorney dated July 6, 1953, is the only power of attorney given by defendant to an agent to represent it in labor negotiations on behalf of its employees which is still in effect, which all parties to this proceeding ing admit, and the only power of attorney exhibited by either party, although there are certain so-called "authorization(s) to represent" in connection with which findings will hereafter be made. See remark of plaintiffs' counsel, Transcript of Proceedings March 24, 1965, p. 84: "This is perhaps the guts of the case", etc.

10. Plaintiffs' cause of action and claim for relief is bottomed upon the allegation that "defendant is a party to the National Master Freight Agreement Covering Over-the-Road and Local Cartage Employees of Private, Common, Contract and Local Cartage Carriers," which claim is in turn based solely upon the powers of attorney and authorizations to represent held by California Trucking Association. See petition, paragraph 4. Plaintiffs attach a copy of the so-called National Master Freight Agreement.

11. In addition to the powers of attorney hereinabove referred to, defendant as a "party to Western States Area Master Freight Agreement and Western States Area Over-the-Road Single Man and Sleeper Cab Supplemental Agreement," gave to California Trucking Association two so-called "authorization(s) to represent," each dated November 30, 1963. See Exhibits D and E attached to Affidavit of S. E. Mansfield, Exhibits E and F attached to Affidavit of Einor O. Mohn, and Exhibits 5 and 6 attached to defendant's first amended original answer.

12. Each so-called authorization to represent is limited "to represent the undersigned (Braswell Motor Freight Lines Inc,) in collective bargaining negotiations incident

to the provisions of the above named contracts and pursuant to reopening notices given under Articles 26, 27 and 36 of the Western States Area Master Freight Agreement."

13. On October 15, 1963, California Trucking Association in requesting defendant's "authorization to represent," made the following explanation:

"'Authorization to represent' forms for national negotiations are enclosed covering your operations under the Western Area Over-the-Road Single Man and Sleeper Cab Supplement, the Western Area Pickup & Delivery, Local Cartage & Dockworkers Supplement, or both, depending on authority given CTA under your present labor power of attorney." The "present labor power of attorney" is that dated July 6, 1953, which is limited to those units of employees specified therein. See Exhibit 4 attached to defendant's first amended original answer. See also Mansfield's Affidavit quoting pertinent clauses from "contract reopening notices, as provided for under Articles 26, 27 and 36 of the Western States Area Master Freight Agreement." See also Counsel's admission in oral argument March 24, 1965, Transcript of Proceedings, p. 85.

14. On July 1, 1957, defendant acquired the capital stock of D. C. Hall Transportation Company, a Delaware corporation, which corporation continued its own separate operations, with change of corporate name only, until a statutory merger with defendant on July 1, 1964. See affidavit of J. V. Braswell.

15. The principal operations of D. C. Hall Transportation Company (corporate named changed to Braswell Freight Lines, Inc.) were from Fort Worth-Dallas north and east, with principal terminals at Oklahoma City and Tulsa, Oklahoma, Jackson, Mississippi, and Shreveport and New Orleans, Louisiana. See Affidavit of J. V. Braswell.

16. Braswell Freight Lines, Inc., was continuously so operating from July 1, 1957, until July 1, 1964. See Affi-

davit of J. V. Braswell. Plaintiffs make no contrary contention. Plaintiffs' counsel admits this. See Transcript of Proceedings herein on March 24, 1965, p. 73.

17. In January 1961 defendant, acting through California Trucking Association, entered into a labor contract with various teamsters locals, all being within defendant's Western Division and represented by the Western Conference of Teamsters, and as negotiated by California Trucking Association on behalf of defendant, pursuant to the power of attorney dated July 6, 1953, which said contract contains a provision (Article 26) wherein "The parties to this agreement accept the principle of a National" agreement and also contains a provision (Article 27) whereby employer agrees "to become a part of the multi-employer unit." See Western States Area Master Freight Agreement, plaintiffs' Exhibit D.

18. In January, 1964, defendant again entered negotiations through its bargaining agent, as limited by the power of attorney of July 6, 1953, with the same western teamsters locals representing employees in defendant's Western Division, which resulted in a National contract creating a national single-multi-employer unit of employees. See Appendix A attached to plaintiffs' petition.

19. Braswell Freight Lines, Inc., was not represented by an authorized agent, with power of attorney or otherwise, in the negotiation of the National Master Freight Agreement, nor is it so contended by plaintiffs. See Exhibit G attached to Affidavit of Einor O. Mohn.

20. Exhibit G, Einor O. Mohn, is a letter addressed to James R. Hoffa by C. G. Zwingle, Chairman, Negotiating Committee, Trucking Employers, Inc., to which latter named corporation California Trucking Association had delegated its authority under its power of attorney and authorization to represent, said letter being accompanied by a "list of the companies currently represented by Trucking Employers, Inc." Such list does not include Braswell Freight Lines, Inc., nor do plaintiffs so contend.

21. Plaintiffs make no contention in this case that the National Master Freight Agreement applies to defendant's Texas Division as heretofore defined. See plaintiffs' first amended original petition.

Conclusions of Law

1. This Court has jurisdiction under 29 U.S.C.A. 185.

2. Plaintiffs are labor organizations and defendant is an employer within the meaning of 29 U.S.C.A. 152 (5) and (2) respectively. Defendant's operations affect interstate commerce within the meaning of 29 U.S.C.A. 152 (6).

3. A power of attorney is sufficient to create an agency only if the principal in the writing makes a clear expression of his intention relative to the appointment and shows what the agent is authorized to do. 2 C.J.S., page 1057, par. 27b(1), and authorities there cited.

4. It is a well settled rule of law that an agent in the performance of his duties where he is to exercise his discretion, skill and judgment, cannot be delegated to another without the consent of his principal. Marshburn v. Stewart, 295 S.W. 679 (Tex.Civ.App. 1927); Brown v. Odneal, 239 S.W. 350 (TexCiv.App. 1922). The rule had been adhered to in Arkansas, Pine Bluff Heading Co. v. Bock, 163 Ark. 237, 259 S.W. 408; Georgia in Mobley v. Marlin, 166 Ga. 820, 144 S.W. 747; Iowa in Mahnke v. Marken, 187 Iowa 762, 174 N.W. 669; Kentucky in Citizens Dev. Co. v. Kypawva Oil Co., 191 Ky. 183, 220 S.W. 88; Maryland in S. J. Van Lill Co. v. Frederick City Packing Co., 155 Md. 303; Massachusetts in Smith v. Abbott, 121 Mass. 326, 109 N.E. 190; as well as in the following states: Minnesota, Mississippi, Missouri, Nebraska, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, West Virginia and Wyoming.

5. A transaction outside the scope of an agent's authority is incapable of affecting the rights, liabilities or responsibilities of the principal. 2 C.J.S. page 1183, par. 91a; 2 Tex. Jur. 2d, page 619, pars. 173 and 174; Evants v. Fuqua,

102 Tex. 430, 118 S.W. 132 (1909), and many others. This is the rule practically throughout all jurisdictions, state and federal.

6. It is elementary that those who deal with an agent must ascertain at their peril the scope of agency. Schutz v. Jordan, 141 U.S. 213 (1891), 35 L. Ed. 705; Dows v. National Exchange Bank, 91 U.S. 618, 636-637 (1875), 23 L. Ed. 214; Richmond Guano Co. v. E. I. DuPont, De-Nemours & Co., 284 Fed. Rep. 803, 806 (4th Cir. 1922); Owens Bottle-Machine Co. v. Kanawha Banking Co., 259 Fed. Rep. 838 (4th Cir. 1919); Raven Fed Ash Coal Co. v. Herron, 114 Va. 103, 75 S.E. 752.

7. If the law was not as stated next above, the agent and not the principal would control the limits of authority. Metropolitan Casualty Ins. Co. v. Potomac Builders Supply Co., 61 F. 2d 407 (D.C. Cir. 1932).

8. The agent's power of attorney dated July 6, 1953, clearly and explicitly expresses the maximum extent of the authority delegated to the Trucking Association), and the intent of the parties is clear. See admission of plaintiffs' counsel in oral argument on March 24, 1965, Transcript of Proceedings, p. 85, "I say * * * that the document itself is non-ambiguous, that if it is ambiguous, if it is read in the written context of prior powers of attorney and prior collective bargaining contracts, that there remains no ambiguity for oral testimony."

9. The Court finds and holds, under the authority cited, that the two "Authorization(s) to Represent" dated November 30, 1963, are wholly insufficient to constitute a power of attorney in that they contain no expressed delegation of authority except by their reference to Western States Area Master Freight Agreement and Western States Area Over-the-Road, Single Man and Sleeper Cab Supplemental Agreement, which reference as to the extent and intent clearly appears in this record, see finding of

fact No. 13). See admission of plaintiffs' counsel on oral argument quoted above.

10. The only legal significance of the "Authorization to Represent" is to evidence the defendant's consent for California Trucking Association to appoint a sub-agent.

11. The only and entire authority of California Trucking Association and its designate, Trucking Employers, Inc., to represent the defendant in labor contract negotiations is and must be found in the power of attorney dated July 6, 1953.

12. Under the indisputable facts, the authorities cited herein, and the power of attorney dated July 6, 1953, California Trucking Association and its designate, Trucking Employers, Inc., had authority to represent defendant in labor negotiations and to enter into binding labor contracts with its employee bargaining units in its Western Division only, but with no other employee bargaining units.

13. Putting it in the converse, California Trucking Association, and its designate, is totally lacking in authority, under the power of attorney dated July 6, 1953, inclusive of the two "authorization(s) to represent," to negotiate a labor contract with any employee bargaining unit represented by any plaintiff herein which would be binding upon defendant.

14. Under the authorities cited in paragraphs 5, 6, 7 and 8 of these conclusions, the Court holds that the attempt to bind defendant by any provision of the National Master Freight Agreement, so far as concerns or relates to any of defendant's Divisions, except its Western Division, and so far as it relates to plaintiffs or any of them, is not within the scope of the Agent's authority.

15. The National Master Freight Agreement of 1964 which established a national single multi-employer unit of employees clearly covers only those employees of defendant

in its Western Division only under the terms of the power of attorney of July 6, 1953.

16. The power of attorney dated July 6, 1953, clearly limits the authority of California Trucking Association and its designate to negotiate labor contracts, affecting only those employee units specified in said power of attorney.

17. The Court holds that under the power of attorney dated July 6, 1953, and the two (2) authorizations to represent, that there is no contractual relationship between plaintiffs and defendant; that California Trucking Association and its designate, Trucking Employers, Inc., were without authority to so contract, save and except only defendant's Western Division.

18. The Court holds that there is no genuine issue of fact having legal probative force in relation to the controlling issue, namely, the extent of the authority of the Agent and its designate to bind the defendant. Elbow Lake Co-Op Grain Co. v. Commodity Credit Corp., 251 F. 2d 633, 637 (8th Cir. 1958); Irving Trust Co. v. U. S., 221 F. 2d 303 (2nd Cir. 1955), cert. denied 350 U.S. 838, 100 L. Ed. 740; Zampos v. U.S. Smelting, Refining and Mining Co., 206 F. 2d 171 (10th Cir. 1953); Durasteel Co. v. Great Lakes Steel Corp., 205 F. 2d 438, 441 (8th Cir. 1953), cited in Elbow Lake Co-op Grain Co. v. Commodity Credit Corp., supra; Alco Kar Kurb, Inc. v. Ager, 181 F. Supp. 97; (D.N.J. 1960); Semon v. Royal Indemnity Co., 179 F. Supp. 403 (W.D. La. 1959), affirmed 279 F. 2d 737; Warner-Lambert Pharmaceutical Co. v. John J. Reynolds, Inc., 178 F. Supp. 655, (S.D.N.Y. 1959); Marion County Co-Op Ass'n. v. Carnation Co., 114 F. Supp. 58 (W.D. Ark. 1953), affirmed 214 F. 2d 557; Finlay v. Union Pacific Railroad Co., 6 F.R.D. 284 (D. Kan. 1946).

Entered this 7th day of July, 1966.

D. W. Sutter,
United States District Judge

Order Denying Plaintiffs' Motion for Summary Judgment and Granting Defendant's Motion for Summary Judgment

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

Civil Action No. 2892

TEAMSTERS LOCAL UNIONS 745, 47, 896, 523, 270, 5, 568, 657 and 891, *Plaintiffs*,

v.

BRASWELL MOTOR FREIGHT LINES, INC., *Defendant*.

(Filed July 7, 1966)

The above entitled cause being before the Court on motion for summary judgment filed by both plaintiffs and defendant, and said motions having been heard on the pleadings, affidavits, briefs, reply briefs, oral arguments, and subsequently filed additional briefs and reply briefs; and

The Court findings that the material and determinative facts necessary to the determination of said motions are undisputed; and the Court having filed herein its findings of fact and conclusions of law now finds that plaintiffs' motion for summary judgment (which seeks determination of the issue of liability alone, and defers the damage issue to later trial pursuant to Rule 42, F. R. C. P.,) must be, and it is hereby, denied; and that the defendant's motion for summary judgment should be, and it is hereby, granted. It is so Ordered.

It is Further Ordered that the petition of Intervenor, Braswell Employees Union, as a party plaintiff, be dis-

missed, and that all costs be, and they are hereby, taxed against the plaintiffs.

Dated this 7th day of July, 1966.

D. W. Suttle,
United States District Judge.

A true copy of the original, I certify.

Maxey Hart,
Clerk,

By Pauline G. Shafer,
Deputy.

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT.

No. 24089.

Teamsters Local Unions, 745, 47, 886, 523, 270, 5, 568, 667 and 891, *Appellants,*

v.

Braswell Motor Freight Lines, Inc., *Appellee.*

(Filed March 25, 1968)

Before Bell, Gossold and Dyer, Circuit Judges.

Gossold, Circuit Judge:

This is a suit brought by the appellants, nine Teamsters local unions, under § 301 of the Labor Management Relations Act, 29 U.S.C.A. § 185, seeking to enforce an award of an arbitral body provided for by the National Master Freight Agreement ("the Agreement"), a collective bar-

gaining agreement to which they and the appellee are parties.[1]

The appellee, Braswell Motor Freight Lines, Inc., ("Braswell") is a common carrier motor freight line. The portion of its operation between El Paso and Los Angeles is known as the Western Division. Since 1959 Braswell has had a series of labor contracts with Teamsters locals not parties to this suit covering 30 employees in the Western Division.

The Agreement contains provisions making it applicable to subsequently acquired operations of the employer. Braswell acquired through merger with a wholly owned subsidiary (Braswell Freight Lines, Inc., hereinafter "BFL") an additional operation (the "BFL operation") operated from Dallas Ft. Worth to Oklahoma City and Tulsa and east to Memphis, Jackson and New Orleans. The appellant locals are bargaining agents for all employees in the BFL operation. These locals never have had a contract with Braswell in the Western Division nor in the Texas Division (El Paso to Dallas), which is unorganized.

An arbitration proceeding was called for under provisions of the Agreement relating to interpretation of the Agreement, and was held. Braswell did not participate in the arbitration on the merits of the controversy. The arbitral body decided Braswell was required to apply the contract to the appellant locals. Braswell declined and the locals sued. The district judge concluded that Braswell was a party to the Agreement only with respect to its employee bargaining units in its Western Division, and, treating that as dispositive of the case, granted summary judgment to Braswell. We reverse and direct that summary judgment be entered for the appellants.

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[1] For earlier appeal in this case on a procedural matter, see Davis v. Braswell Motor Freight Lines, Inc., 363 F.2d 600 (5th Cir. 1966).

I

In July, 1953, appellee executed a power of attorney to Motor Truck Association of California as bargaining agent. Pursuant thereto the Association entered into the Western States Area Master Freight Agreement to extend from July 1, 1961 to June 30, 1964, Braswell thereby becoming a party thereto. This agreement contained express recognition of the Teamsters' ambition to obtain a uniform nationwide agreement in the future, and it bound the employers, on written notice, to negotiate toward such an agreement:

ARTICLE 26. NATIONAL AGREEMENTS

The parties to this Agreement *accept the principle* of a National Over-the-Road Agreement and a National Pick-up and Delivery and City Cartage Agreement. Accordingly, *the Employers and the Unions which are parties to this Agreement shall*, on written notice from the Union at least ninety (90) days before the termination date of this Agreement, *enter into negotiations for the purpose of negotiating such National Agreements*. However, nothing herein contained shall be construed as requiring any party hereto to be committed to a policy of complete uniformity in all matters which are covered by such National Agreements. (emphasis added)

In 1963 Teamsters unions over the country gave notice to employers of their desire to terminate area contracts then in effect and negotiate a nationwide contract. Industry representatives throughout the United States agreed that a national association should be formed to bargain with the Teamsters on a national basis. The employers' negotiating group, Trucking Employers, Inc., was formed.

The unions sent a letter notice to Braswell in September, 1963 notifying it of the unions' "desire to negotiate changes or revisions in the Western States Area Master Freight Agreement * * * and to enter into a National Agreement as provided in Articles 26, 27 and 36 of the Area Master Agreement."

The California Trucking Association (the new name for the Motor Truck Association of California) sent Braswell notice of the union demands for reopening the contract, called attention to Article 26 of the Western States Agreement, and said:

> "Authorization To Represent" forms for national negotiations are enclosed herewith covering your operations under the Western Area Over-the-Road Single Man and Sleeper Cab Supplement, the Western States Area Pickup & Delivery, Local Cartage & Dock Workers Supplement, or both, depending on authority given CTA under your present labor power of attorney. It is necessary that we receive the executed "Authorization" at the earliest possible date as we will have to advise the Union Negotiating Committee as to the companies who are represented.
>
> If for any reason your company does not wish to execute the "Authorization To Represent," you should advise us immediately and cancel your present labor power of attorney. Otherwise, you will be included in the bargaining unit and bound by the results of the national negotiation but without being represented.
>
> If you sign the enclosed "Authorization" it will not be necessary for you to take any other action or to acknowledge the Union's reopening notices.

Subsequent letters to Braswell from the Association reiterated the contents of the above-quoted second paragraph and advised Braswell of steps that should be taken in the national negotiations. Braswell then executed and sent to the Association this Authorization:

> Company Authorization to Represent.
>
> The undersigned, party to Western States Area Master Freight Agreement and Western States Area Over-the-Road Single Man and Sleeper Cab Supple-

mental Agreement, which agreements are in effect through June 30, 1964, does hereby authorize the California Trucking Association and/or any other trucking employer group or committee designated by the California Trucking Association to represent the undersigned in collective bargaining negotiations incident to the provisions of the above named contracts and pursuant to reopening notices given under Articles 26, 27 and 36 of the Western States Area Master Freight Agreement.

This authorization shall continue in full force and effect until written revocation hereof is made by Certified Mail to California Trucking Association at 3301 South Grand Avenue, Los Angeles 7, California.[2]

The appellant locals executed powers of attorney to the union negotiating committee to represent them in the bargaining on the national contract, and they are parties to the Agreement by reason thereof.

Subsequently the employers, negotiating through Trucking Employers, Inc., and the unions arrived at the National Master Freight Agreement, effective from February 1, 1964 to March 31, 1967. California Trucking Association was one of the employer groups on whose behalf Trucking Employers, Inc., acted. The Agreement established a national single multi-employer unit of employees.

Article 1, § 1, defining Parties to the Agreement, provides "The signatory Associations enter into this Agreement and Supplemental Agreements on behalf of their members under and as limited by their authorizations." The Agreement also contained the following provision:

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[2] This Authorization related to Braswell's agreement with its over-the-road employees. A second Authorization of the same date is the same except that it referenced Braswell's Agreement with local cartage employees.

[T]his provision shall apply to all present and subsequently acquired operations and terminals of the Employer.

* * * * * *

The provisions of this Agreement shall apply to all accretions to the bargaining unit including but not limited to newly established or acquired terminals, consolidations of terminals, etc.

[Art. 3, § 1(a).]

Braswell recognizes the Agreement has been binding on it since execution on regard to the employee units in its Western Division.[3]

The BFL operation came into the picture in the following way. On July 1, 1957 appellee acquired the stock of D. C. Hall Transportation Company and operated it as a separate corporation under the name Braswell Freight Lines, Inc. (BFL). The corporate entity BFL was not a party to negotiation of the Agreement. Negotiation of the Agreement began in November, 1963, concluded in January, 1964, and the Agreement was ratified in February, 1964. Braswell Freight Lines, Inc., was merged with appellee on July 1, 1964.

Beginning in 1950 or earlier BFL, and its predecessor Hall, were under collective bargaining contracts with the appellant Teamsters locals. In 1961 BFL gave notice of

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[3] Braswell's analysis is that it is bound by the Agreement only to the limited extent of employee bargaining units already under contract to it, a limitation in terms of units and not of geography. Thus, even as to a subsequently acquired terminal or operation in the Western Division Braswell would have to contend that the Agreement is not applicable unless the bargaining unit for the affected employees was one of the locals under contract when the Agreement was made. (four at Los Angeles, two at Phoenix, one at Tucson, one at El Paso.)

cancellation of the contracts and filed a petition with the NLRB to have appellants decertified on the ground that they no longer had majority status. BFL withdrew the NLRB petition and unsuccessful bargaining followed. Appellants struck BFL in April, 1962; as of January 25, 1965 the strike was still in progress.[4]

After the merger appellants took the position that the BFL operations were covered by the Agreement by reason of the above-quoted provisions of Art. 3, § 1. Braswell disputed this. Appellants, pursuant to the grievance procedure of Art. 8 of the Agreement, filed with the National Grievance Committee, composed of five employer and five employee representatives, a "Request for Interpretation of National Master Freight Agreement."

Braswell filed a special appearance before the Committee saying:

> Braswell Motor Freight Lines, Inc. has been advised of a request for interpretation of National Master Freight Agreement filed by Murray W. Miller, Chairman and Area Director of the Southern Conference of Teamsters. Braswell Motor Freight Lines, Inc. makes this special and limited appearance in this proceeding for the sole and only purpose of challenging the jurisdiction of the Committee to act, in that all matters outlined and contained in the Southern Conference request for interpretation of National Master Freight Agreement even the matter of employees representation are by statute within the exclusive jurisdiction of the National Labor Relations Board and are now pending before the Board in Case No. 16-CA-1648, and there-

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[4] For some of the history of relations between the appellant locals and BFL, see: Braswell Motor Freight Lines, Inc., 154 NLRB 101 (1965) *reconsidering* 141 NLRB 1154 (1963), *enforced*, Teamsters Local Unions 745, 47, 886 etc. v. NLRB, 125 U.S.App. D.C. 204, 370 F.2d 226 (1966).

fore such matters are not properly before this tribunal.[5]

A letter from Braswell, forwarding a copy of the special appearance, reiterated its objection "to any consideration on the merits of this agreement due to the sole and exclusive jurisdiction of the National Labor Relations Board over the subject matter of this request for interpretation."

Beyond filing the special appearance Braswell did not participate in the proceedings before the Committee. The Committee reached the merits of the request for interpretation and unanimously determined that the intent, purpose and meaning of the Agreement required Braswell to apply the Agreement to that part of its merged operation which had been the BFL operation.

Article 8(a) (2) of the Agreement provides, "If the National Grievance Committee resolves the dispute by a majority vote of those present and voting, such decision shall be final and binding upon the parties."

The appellant locals filed suit, characterizing the action as for violation of a collective bargaining agreement, alleging refusal by Braswell to apply the Agreement to the BFL part of its operation and refusal to comply with the Committee decision.

The district court denied appellants' motion for summary judgment and granted the motion of appellee. The court

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[5] Case 16-CA-1648 is that referred to in footnote 4, supra. In that case, on July 30, 1965 the full National Labor Relations Board found there had been refusal to bargain in good faith with the appellant locals. The Local Trial Examiner (see 141 NLRB 1154) had treated Braswell, BFL, and J. V. Braswell individually as a single employer, system and enterprise for NLRB purposes, by reason of common ownership and control, the degree of integration of their operations, common officers and directors and the final authority of J. V. Braswell on labor matters. In its decision (154 NLRB 101) the Board treated the same parties as a single enterprise.

filed extensive findings and conclusions, but the crux is that the only power of attorney giving the Association power to bind Braswell at the time of negotiation of the Agreement was the 1953 power, that the only effect of the 1963 Authorization was to give the Association power to delegate to a subagent, (Trucking Employers, Inc.), the authority given the Association by the 1953 power. Thus, the court reasoned, Braswell was bound to the Agreement only insofar as the 1953 power authorized the Association to bind Braswell, which was only as to its Western Division, so that there was no contractual relationship between Braswell and the appellant locals.

[1 4] Whether a particular controversy arising under a collective bargaining agreement is subject to arbitration is usually a matter to be determined by the courts in either a suit to compel arbitration or to enforce an arbitration award. E. g., United Aircraft Corp. v. Badge 971, International Ass'n of Machinists, 330 F.2d 150 (5th Cir. 1966).[6] If under the agreement the decision of the arbitrator is final and binding on the parties, a court in a suit to enforce the award may not weigh the merits of the questions. Humphrey v. Moore, 375 U.S. 335, 84 S. Ct. 363, 11 L. Ed. 2d 370 (1964). Where no material issues of fact are presented in a suit for enforcement of an award, summary judgment is proper. Fontainebleau Hotel Corp. v. Hotel Employees' Union, Local 255, 328 F. 2d 310, 314 (5th Cir. 1964).

[5] The "trilogy cases"[7] and their successors in this

[6] The parties may agree that the arbitrator may himself finally determine arbitrability. Metal products Workers Union, Local 1645 v. Torrington Co., 358 F.2d 103 (2d Cir. 1966), but it is not contended that any such provision of the Agreement puts arbitrability beyond judicial review in this case.

[7] United Steelworkers of America v. American Mfg. Co., 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960); United Steelworkers of of America v. Warrior & Gulf Nav. Co., 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960).

circuit * require that settlement of industrial disputes by arbitral machinery chosen by the parties be given the fullest play.

> The function of the Court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract.
>
> * * * The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious.

United Steelworkers of America v. American Mfg. Co., 363 U.S. 564, 567 568, 80 S. Ct. 1343, 4 L. Ed. 2d 1403, 1407 (1960). "It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of a contract, the courts have no business overruling him because their interpretation of the contract is different from his." United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599, 80 S. Ct. 1358, 1362, 4 L. Ed. 2d 1424, 1429 (1960). "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582 583, 80 S. Ct. 1347, 1353, 4 L. Ed. 2d 1409, 1417 (1960).

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* E.g., Marble Products Co. v. Local 155, United Stone and Allied Products Workers, 335 F.2d 468, 470 n. 2 (5th Cir. 1964); Local No. 787, International Union of Electrical, Radio and Machine Workers v. Collins Radio Co., 317 F.2d 214 (5th Cir. 1963).

[6-8] The district court treated as disposing of the case its conclusion that the authority Braswell granted to contract was only as to units in its Western Division, so that the Agreement, as and when negotiated, established at that time no employer-employee collective bargaining relationship between Braswell and the BFL locals. But, applying the above established principles of law to this case, the district court's conclusion does not answer the question of whether employees serving an operation or terminal subsequently acquired or established are to be brought within the Agreement only if their bargaining agent is one of the Western Division locals already under contract. The Agreement contemplates that acquisition or establishment of *some* terminals and operations will extend the coverage of the Agreement. Without our assigning weight to any of them, there are many facts and circumstances that could aid in determining whether the Agreement means what Braswell concludes it means or what the BFL locals conclude it means—many terms of the Agreement itself, the history of industrial strife involving the BFL locals and J. V. Braswell and both Braswell companies, the recognized intent of the Teamsters to achieve a multi-employer unit, the expressed intent that the Agreement apply to some newly acquired facilities, the fact that the BFL locals are themselves parties signatory to the Agreement, the traditional meanings of "bargaining unit" and "accretion." We cannot "[say] with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.' *United Steelworkers of America*, supra. We hold that the dispute was a matter of interpretation under Article 8 and an arbitrable issue. It was peculiarly susceptible of decision by arbitration among the parties who are familiar with the industry with the history of labor relations in the segment of the industry occupied by Braswell (and its subsidiary), and with the negotiation of the Agreement. It was the issue for decision of which the interpretive procedure was invoked and which the National Grievance Committee (made up an equal number of em-

ployer and union members) met to hear and unanimously decided. The agreement of the parties that the award was final must be given effect.[9] Braswell could make an argument that the strife with BFL locals was evidentiary of its intent that the acquired terminal provisions were to be limited to terminals whose employees already were represented by the Western Division locals. But this is an argument on the merits of the arbitrable issue, properly to be made before the arbitral body and not there made. If made, it would come too late in this court.

[9-11] No different result is called for by reason of the Agreement's not containing the specific word "arbitration." The interpretive procedure is the means chosen by the parties and is to be given full play. United Steelworkers of America v. American Mfg. Co., supra.[9a]

II

[12] While what we have said is dispositive of the case we point out that we do not agree with the district court's

[9] It is not without significance that when Braswell attacked the jurisdiction of the Grievance Committee by "special appearance" it did not raise the issue now made central to the case. We do not mean by this that the Committee's determination of what is an arbitrable issue is in this case beyond judicial review because Braswell did not file a "plea to the jurisdiction" of the Committee asserting the particular ground now asserted or because Braswell did not make a "general appearance" and participate. All we say is that as an evidentiary matter, to be considered by us in determining whether its issue was an arbitrable one, we find it significant that the sole contention made before the arbitral body was that the NLRB had exclusive jurisdiction.

[9a] Nor is a different result called for by reason of the provisions of Article 8(d) allowing the union to strike in case of "deadlock, default or failure to comply with majority decisions.' The default and failure to comply referred to plainly are those of the company. Arbitration decisions reached (as opposed to deadlock situations) are final and binding. Article 8(d) does not make them any less so by allowiing the union to strike if the company defaults or fails to comply with a decision reached.

conclusion that the Authorization itself forever limited Braswell's participation in the Agreement to its Western Division. We do not spell out the evidence in detail. But the Authorization does not have by its face, free of ambiguity, the meaning the district court ascribed to it. We are inclined to the view that on its face it means just the reverse, that the phrase "to represent the undersigned in collective bargaining negotiations incident to the provisions of the above named contracts and pursuant to reopening notices given under Articles 26, 27 and 36 of the Western States Area Master Freight Agreement" is not a limitation on bargaining authority but a specific incorporation of the provisions of Article 26, 27 and 36 which committed Braswell to national negotiations and a single unit.

[13] We are hard put to find any ambiguity. But if ambiguity there be the fog burns away early and quickly in the light of the past history, the correspondence of the Association with Braswell and the plain import of what bargaining for a National Agreement was all about.[10] In reaching this conclusion we apply federal law and the precepts of national policy in the labor field, not state law relating to principal and agent in commercial transactions.[11] Under that law:

> The collective bargaining agreement states the rights and duties of the parties. It is more than a contract;

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[10] Also it seems to us beyond question that the phrase in the Association's letter to Braswell, "depending on authority given CTA under your present labor power of attorney" is a reference to the local cartage contract, the over-the-road contract, "or both, depending (etc.)" Some employers had given powers of attorney for local contracts, some for road contracts, some for both. The employers' negotiating agency notified the union negotiators what employers it represented and for what contracts.

[11] Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957); Local 174, Teamsters, Chauffeurs, Warehousemen and Helpers v. Lucas Flour Co., 369 U.S. 95, 82 S.Ct. 571, 7 L.Ed.2d 593 (1962); Aveo Corp. v. Aero Lodge No. 735, IAM, 376 F.2d 337 (6th Cir. 1967).

> it is a generalized code to govern a myriad of cases which the draftsman cannot wholly anticipate. • • • The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry • • •. A collective bargaining agreement is an effort to erect a system of industrial self government.

United Steelworkers of America v. Warrior & Gulf Nav. Co., supra, 363 U.S. at 578-580, 80 S. Ct. at 1351, 4 L. Ed. 2d at 1415-1416. An industry "has its own customs and its own vocabulary, and lives according to rules of its own making." Dallas Typographical Union v. A. H. Belo Corp., 372 F. 2d 577, 579 n. 4 (5th Cir. 1967).

III

[14] It is not the function of the courts to weigh the merits of the decision of the arbitral body on an arbitrable issue which the parties agreed be final. Neither the arbitrability of the issue nor the finality of the body's decision is watered down by Braswell's election to stay away from the arbitration, for arbitration agreements cannot thus be frustrated. There being no material disputed issues of fact the appellants are entitled to the summary judgment for which they asked.

Reversed and remanded to the district court for entry of summary judgment for the appellants and for such proceedings thereafter as are appropriate.

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 24099

TEAMSTERS LOCAL UNIONS, 745, 47, 886, 523, 270, 5, 568, 667 and 891, *Appellants*,

v.

BRASWELL MOTOR FREIGHT LINES, INC., *Appellee*.

Before BELL, GODBOLD and DYER, Circuit Judges.

ON PETITION AND SUPPLEMENTAL PETITION FOR REHEARING EN BANC

(Filed June 28, 1968)

GODBOLD, Circuit Judge:

The Teamsters locals, claiming to be parties to a collective bargaining agreement with Braswell, ("the Agreement"), sued for damages, specific performance and an injunction against breach by Braswell. The district court, in granting summary judgment for Braswell, found the Agreement never applied to these locals. We have held that these locals are parties to the Agreement by virtue of an arbitral award to that effect, which award is entitled to enforcement, and have reversed the grant of summary judgment to Braswell.

The Teamsters sought summary judgment below on the issue of liability alone, with damages reserved, which is authorized by Fed.R.Civ.P. 56(b). Our conclusion, rather than being styled a summary judgment or partial summary judgment for the unions, would more appropriately be styled a ruling as a matter of law on the single issue that the appellant locals became parties to the Agreement. That issue is now established for this action.

[1] Further proceedings as to the scope and quantum of relief to which the unions may be entitled, and defenses, if any, that Braswell may have, are for the trial court in the first instance and not for this court.

[2] While recognizing the right of Braswell to present in the district court its defenses, if any, to liability, we reject summarily the contention made to us that it is a defense to Braswell that the Teamsters locals failed to file any grievance and to pursue grievance procedures under the Agreement. The unions cannot be barred for failing to exhaust grievance arrangements under a contract which Braswell insisted did not apply to them.

[3] Our conclusion that the contract is applicable to these Teamsters locals disposes of the argument of Braswell on rehearing that a retrospective card check is required to determine whether at the time the contract became applicable to the BFL locals these locals in fact represented a majority of the BFL employees, otherwise the employer and the union might be, by contract, imposing on the BFL employees representation by a union that did not represent a majority. The National Labor Relations Board found that the BFL employees were an appropriate unit and ordered Braswell to bargain with these unions as their bargaining agent. 141 NLRB 1154; 154 NLRB 101.

The petition, and supplemental petition, for rehearing are granted in part and denied in part. No member of this panel nor Judge in regular active service on the court having requested that the court be polled on rehearing en banc, the suggestion for rehearing en banc is denied.

The last paragraph of our opinion of March 25, 1968 is vacated. The summary judgment in favor of Braswell is reversed. The cause is remanded to the district court for such proceedings thereafter as are appropriate and not inconsistent with this opinion.

Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

No. 28926

TEAMSTERS LOCAL UNIONS 745, 47, 386, 523, 270, 5, 568, 667, and 891, *Plaintiffs-Appellees*,

v.

BRASWELL MOTOR FREIGHT LINES, INC., *Defendant-Appellant*.

(September 3, 1970)

PER CURIAM: The Petition for rehearing is denied and no member of this panel nor judge in regular active service on the court having requested that the court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local 5th Circuit Rule 12), the petition for rehearing en banc is denied.

APPENDIX B

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Fifth Amendment to the Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Section 301(a) of the Labor Management Relations Act, 29 U.S.C. sec. 185(a) provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.